IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO. 5046 OF 1990. .

Jayantilal Devraj Shah ... Petitioner.

V/s.

1. M/s Narang Industrial and Engineering Co.

2. Niagara Overseas Pvt.Ltd. ... Respondent.

WITH

WRIT PETITION NO. 5047 OF 1990. .

Ratilal Devraj Shah ... Petitioners.

V/s.

1. Ms Narang Industrial and Engineering Co.

2. Niagara Overseas Pvt.Ltd. ... Respondents.

Shri Snehal Shah i/b M/sDhru & Co. for the petitioners.

Shri C.R. Dalvi with Shri M.B. Badkar for respondent Nos. 1 & 2.
(in both matters).

CORAM: V.C.DAGA, J.

DATE : 16.8.2004.

JUDGMENT:

. The petitioner in each of the above-mentioned two writ petitions is ‘landlord’ of the Industrial Gala

Nos.15 and 16 at Bhandup respectively. Respondents in both writ petitions are tenants. The parties to the petitions are common. The facts and circumstances involved therein are identical. The issues for determination and submissions made are same, so a single judgment will dispose of both writ petitions.

Backdrop Facts:

2. The background of the dispute lies in narrow compass. It is not necessary to trace the history of the litigation from deck to deck. The petitioner filed two suits being RAE & R Suit Nos. 313/1031 and 314/1032 of 1984 in respect of Gala No.15 and 16 respectively situate at Bhandup, Mumbai, in the Small Causes Court, Mumbai, for recovery of possession under the provisions of the Bombay Rent, Hotel and Lodging House Rates Control Act, 1947 alleging habitual defaults on the part of respondents-tenant in payment of monthly rent and arrears of thereof.

3. Both the above suits were decreed exparte in the month of July, 1987 as respondents- defendants in both suits chose not to file their written

statements in spite of putting their appearances through their common advocate and further chose to remain absent even on the subsequent dates of hearing with the result the trial Court trying the suits had no option but to decree both suits exparte.

4. Petitioner- decree holders after obtaining exparte decrees, took out Notices under Order 21 Rule 22 of the C.P.C. for execution of the decrees so as to seek possession of the suit properties.

5. On being noticed, the respondents- judgment debtors took out notices for setting aside exparte decrees both dated 22.2.1988 but did not take any step to get them registered, with the result; Notices for execution of both decrees were made absolute by the executing Court on 4.11.1988.

6. The notices for setting aside exparte decrees, ultimately, came to be registered some time in the month of March, 1989 as Misc.Notice Nos. 199 of 1989 and 200 of 1989 respectively. After hearing parties, execution proceedings came to be stayed subject to certain conditions. Respondent No.2, as per the conditional orders of the executing Court,

through their Director undertook to deposit entire arrears of rent with recurring monthly rent in suitable instalments.

7. The trial Court, by two separate judgments and orders both dated 26.4.1989, set-aside exparte decrees and directed respondents to deposit the entire monetary decretal liabilities on or before 30.9.1989. Respondents could not deposit their decretal liabilities within prescribed time, as such on 5.10.1989 they applied for extension of time to make necessary deposits. However, applications made in this behalf,f in both execution proceedings, came to be rejected.

8. Being aggrieved by both judgments and orders dated both 26.4.1989, petitioners filed two Revision Applications before the Division Bench of the Small Causes Court, at Mumbai being Revision Application Nos. 151 and 152 of 1989. The said revision Applications came to be rejected by separate orders on 15.3.1990.

9. Being aggrieved by the above separate judgments and orders of the Division Bench of the Small Causes Court, the petitioners filed present two writ

petitions under Article 227 of the Constitution of India.

10. The present petitions were admitted by this Court on 29.1.1991 and, thereafter from time to time number of interim orders/directions were issued by this Court with respect to appointment of Receiver and payment of arrears of rent and/or royalty amount. However, respondents did not comply with the said orders in its true letter and spirit. Needless to mention, at this stage of the judgment, it is not necessary to recapitulate those orders or subsequent events leading to non-compliance of the orders of this Court as it can have bearing only on the question of exercise of discretionary writ jurisdiction.

Submissions:

11. Shri Snehal Shah, learned Counsel for the petitioner submitted that the trial Court was not justified in setting aside exparte decrees vide its order dated 30th September, 1999 and directing payment of entire monetary decretal liability. He submits that if at all the trial Court was inclined to set aside exparte decrees, then the orders passed

by it ought to have been made conditional one, making it operative subject to deposit of entire monetary decretal claims by a specified date; so that, in the event of failure on the part of the judgment debtors to discharge their monetary part of the decretal liabilities, the notices of motion taken out by them under Order 9 Rule 13 of the C.P.C. could have resulted in automatic rejection thereof. He further submitted that, admittedly, notices under Order 9 Rule 13 of C.P.C., were barred by limitation in both cases in view of Article 123 of the Limitation Act, 1963. He further submits that suit summonses in both suits were duly served as such time to invoke jurisdiction under Order 9 Rule 13 had started running from the date of decree i.e. 26.4.1989.

12. Shri Shah further submits that notices which were taken out by the respondents for setting aside exparte decrees, no doubt, contained prayers seeking condonation of delay in taking out such notices; but no specific orders, condoning delay in taking out such notices, were passed by the trial Court.

13. Shri Shah, turning to the merits of the notices taken out by respondents under O.9 R.13 submits that

the trial Court did not consider merits of either of the applications. Trial Court did not record any finding whatsoever; as to whether or not any sufficient cause was made out to demonstrate as to why respondents chose to remain absent and did not take part in the suit proceedings.

14. Shri Shah further submits that being aggrieved by the orders of the trial Court both dated 26.4.1989 whereby exparte decrees were set aside, present petitioner had preferred two revision applications before the Division Bench of the Small Causes Court, Bombay, which were erroneously dismissed vide order dated 15.3.1990.

15. Shri Shah submits that the lower appellate Court has expressly taken note of the fact that the trial Court did not condone delay in taking out notices under Order 9 Rule 13 of C.P.C., and that they did not establish that there was just and sufficient cause to remain absent during the trial of the suits. In spite of these findings, Division Bench surprisingly proceeded to record perverse finding that, the order of the trial Court setting aside exparte decrees; impliedly indicated that delay was condoned by it. He submits that concept

of implied condonation of delay has been rejected by the Apex Court in some of the cases. He relied upon readily available judgment of the Apex Court in the case of Ragho Singh vs. Mohan Singh 2001 AIR SCW 2531. He, thus, submits that the impugned orders of the trial Court as well as that of the appellate Court, setting aside exparte decrees, are liable to be set aside.

16. Per contra, Shri C.R. Dalvi, learned Counsel for the respondents did not dispute that the order of the trial Court is completely silent about condonation of delay and/or application of Article 123 of the Limitation Act, 1963. However, he tried to support the findings of the lower appellate Court to the extent it holds that impliedly delay in taking out notices was condoned by the trial Court, since exparte decrees were set aside by it.

17. In rejoinder, Shri Shah, taking this Court through the order of the trial Court submitted that the trial Court had set aside exparte decrees merely with simple directions to the respondents to discharge entire monetary liabilities suffered under exparte decrees. He submitted that the exparte decrees were set aside by the trial Court on the

extraneous consideration without considering impact of Article 123 of the Limitation Act. In his submission, impugned orders passed by the Courts below are not only vague, perfunctory and casual but suffers from perverse approach as such they are liable to be quashed and set aside.

CONSIDERATION :

18. Having heard the rival parties, it is not in dispute that the trial Court did not decide the prayers for condonation of delay and failed to condone delay in taking out notices under O.9 R.13 of C.P.C. It did not consider provision of Article 123 of the Limitation Act, 1963.

19. It is no doubt true that without considering prayers for condonation of delay or in the absence of any order condoning delay, the trial Court could not have assumed jurisdiction. It could not have adjudicated upon notices under O.9 R.13 on merits in the light of the law laid down by this Court in the case of M.M. College of Science vs. R.T. Borkar, 1997 (2) Mah.L.J. 168. The Division Bench in the said case has said:

> : The provision has been made in the Maharashtra Employees Private Schools (Condition of Service) Regulation Act to entertain time barred appeal ion sufficient cause being shown by the appellant and the Tribunal is satisfied. Even though this is a rule of procedure and liberally construed to impart substantive justice, it cannot be forgotten that it is a statutory provision and, therefore, it is necessary for the appellant to show sufficient cause for not preferring the appeal within the time limit prescribed. **Absolute absence on the part of the appellant to explain the delay and or to furnish cause to the satisfaction of the Tribunal takes away the jurisdiction of the Tribunal to entertain the appeal.**
>
> (Emphasis supplied)

On the aforesaid premise, in my considered opinion, the orders passed by the trial Court setting aside the exparte decrees, without considering prayers for condonation of delay, are without jurisdiction. The trial Court could not have assumed jurisdiction and proceeded to consider and/or grant notices taken out by respondent under Order 9 Rule 13 of C.P.C., without condoning delay in taking out such notices. The order of the trial Court was thus without jurisdiction.

20. Having held so, let me to consider the validity of the findings of the lower appellate Court to the extent it holds that the delay was impliedly

condoned by the trial Court since it had set aside exparte decrees. Shri Shah is right in his submission when he submits that the concept of implied condonation of delay has not been accepted or recognised by the Apex Court. In the case of Mohan Singh (supra) Apex Court has held thus:

> " We have heard learned Counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under section 5 of the Limitation Act was not filed for condonation of delay, **there was no jurisdiction in the Additional Collector to allow that appeal.** The appeal was liable to be dismissed on the ground of limitation. **The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay be deemed to have been condoned. This is patently erroneous.** In this situation, the Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs." (Emphasis supplied)

21. Having recorded above findings, this Court was left with two alternatives; either to hold that the orders passed by the trial Court and affirmed by the lower appellate Court are without jurisdiction and allow these writ petitions or to remand the proceedings back to the trial Court for consideration of the prayers seeking condonation of

delay in taking out notices under O.9 R.13 of the C.P.C., as there was a serious lapse on the part of the trial Court in not considering such prayers for which respondents cannot be blamed. However, considering the long span of litigation ranging from 1984 to 2004, i.e. of about 20 years, parties were called upon to make their submissions as to whether or not issue with regard to condonation of delay should be considered and decided by this Court in the present proceedings. Both the parties, through their advocates, without keeping any reservation, fairly submitted that this Court should only consider the question of condonation of delay and that the matters need not be remitted back to the trial Court. They also filed joint written purshis to this effect. The same is taken on record and marked X for identification.

22. With a view to hear parties, on merits of prayers seeking condonation of delay, both parties were called upon to address this Court. Accordingly, rival submissions were advanced by the parties to these petitions.

Submissions on condonation of delay:

23. Shri Shah, learned Counsel appearing for the appellant strongly opposed prayer for condonation of delay. He submits that no sufficient cause or explanation was furnished by the respondents. He without prejudice to this submission, went on to dispute contents of the pleadings of the respondents and material placed therein to seek condonation of delay. He tried to dissect the pleadings with forensic skill. Firstly, he tried to demonstrate absence of pleadings in support of prayers for condonation of delay, and went on to submit that the contents of the affidavits are not only vague but they are false. Secondly, he submits that the alleged facts sought to be pleaded do not make out any case for condonation of delay. No explanation explaining sufficient cause for delay is to be noticed in the applications.

24. Shri Shah tried to expose falsity of pleadings and disputed factual data sought to be furnished in the affidavits. He took this Court through the affidavits of Dr.R.M.Agarwal, Director of the respondent-Company, dated 3rd March, 1988. He submits that though, on oath, a statement has been made by the respondents that they were involved in several litigations, as such through an oversight

they lost track of the said matters in question. He submits that no details of these litigations are to be found in either of the affidavits. He further submits that if person has several litigations, then, all the more it was expected on the part of such person not to lose track of the matters in question. In his submission, person having litigations developes a habit of maintaining proper and systematic record of various litigations because he has to attend various litigations either on daily or monthly basis in various Courts on various dates. According to Shri Shah, explanation putforward is an afterthought. He submits, had there been several litigations details thereof would have been readily furnished by the respondents to establish their bonafides. He submits that in absence of details or material particulars of alleged litigations, this Court must draw an adverse inference against the respondents that had such details been disclosed, those details would have gone against them.

25. Shri Shah relied upon the factual admission given by the respondents whereby they have admitted to have engaged an advocate on their behalf to represent them in the said suits and that their advocate had filed appearance in both suits on

25.4.1984. The suits were adjourned on several occasions expecting written statement from them. He, thus, submits that the limitation, to take out notice under O.9 R.13 of C.P.C., starts running under Article 123 of the Limitation Act, from the date of decree if the defendant appeared in the suit pursuant to the suit summons. As such, he submits, in this case, limitation needs to be counted from the date of decrees in question.

26. Shri Shah submitted that no explanation is to be found in the affidavits as to why respondents did not contact their advocate, when it was obligatory on their part to remain in touch with him. He further submitted that nothing is to be found in the application as to what steps were taken by them to protect their interest during the period of 3 years right from 1984 i.e. from the date of filing of vakalatnama of their advocate in suits till 2.7.1987, i.e. till the date of exparte decrees were passed. In his submission, considering absence of material facts and particulars thereof respondents are disentitled to seek condonation of delay.

27. Shri Shah further submits that even after

taking out notices for setting aside exparte decree dated 22.4.1988, no steps were taken by respondents to get their notices registered. They got their notices registered only after notices for execution of decrees taken out by the petitioners (decree holders) were made absolute by the executing Court. He, therefore, submits that negligence, carelessness and calcitrant attitude on the part of the respondents during this period of 9 months is also an important factor sufficient to demonstrate that at no stage of litigation respondents were acting diligently to protect their interest.

28. Shri Shah further tried to demonstrate negligence on the part of the respondents which has taken place during the pendency of the writ petitions, so as to demonstrate conduct, negligence and carelessness on the part of the respondents so as to persuade this Court not to grant discretionary relief in favour of the respondents. Shri Shah to elaborate his submission, submits that by an order dated 15.11.1991 this Court had issued directions to the Receiver not to dispossess the defendants-respondents from the suit premises, provided, they were ready to act as agent of the receiver and pay such compensation as Receiver may determine.

However, respondents failed to attend office of the Receiver and deliver possession of the suit premises to the Receiver.

29. Shri Shah points out that the respondents took out Civil Application No. 243 of 1992 and C.A. No. 245 of 1992 for setting aside the order dated 15th November, 1991 appointing receiver in respect of the suit premises, but no orders were obtained from the Court with the result, Court Receiver had to take formal possession of the suit premises on 5.2.1992 and usual undertaking from them that they would use and occupy the said premises as agent of the Receiver. On 6.2.1992, both these civil applications came to be disposed off. While disposing of these civil applications, respondents were directed not to put their board on the premises and they were granted two weeks time to deposit amount of arrears payable to the petitioners in the sum of Rs. 1,26,400/- and Rs.1,51,680/-. The petitioners were permitted to withdraw this amount if deposited by the respondents in the trial Court. In this view of the order, by consent, further proceedings in RAE& R Suit No. 313/1031 of 1984 and No. 314/1032 of 1984 were stayed.

30. On 15.5.1992, the Court Receiver directed the respondents to furnish draft of agency agreement and undertaking to the Court Receiver. The respondents did not comply with the necessary requirements and sought adjournment to make submissions on the draft agency agreement and valuation report but failed to make any submission in spite of grant of sufficient time. The Court Receiver fixed amount of royalty at Rs.7000/- p.m. for shed No. 15 and Rs.9000/- p.m. for shed No.16. The respondents were directed to pay compensation for the period from 15th November 1991 till October 1992. The Court Receiver put them on notice that if the respondents failed to pay the arrears of compensation the receiver would report their failure to this Court. In spite of this respondents did not pay arrears as ordered.

31. Learned Single Judge on 8.12.1995, directed the respondents to deposit in this Court a sum of Rs. 1,00,000/- in each petition by 14th December, 1995 to show their bonafide and willingness to pay compensation/royalty for use and occupation of the suit premises. Upon such deposit, the petitioners were permitted to withdraw the said amount, which they have withdrawn on 14.12.1995. The respondents failed to pay the amount of compensation fixed by

the Court Receiver and also failed and neglected to submit draft agency agreement in spite of various opportunities given to them, with the result the petitioner was required to take out Civil Application Nos. 7681 of 1996 and 7711 of 1996 to seek directions against the respondents to pay the arrears of ad hoc royalty.

32. The learned Single Judge had again directed the respondents to deposit in this Court an amount of Rs. 3,48,000/- being balance of ad hoc royalty before 15th March 1997. Respondents failed to obey this order. By a common order, learned Single Judge, noticing defaults on the part of the respondents, left with no alternative directed the Receiver to take physical possession of the suit premises immediately. Thereafter, from time to time, appointments were fixed by the Receiver, to take back possession of the suit premises from the respondents,however, till this date, neither receiver was allowed to take possession of the suit premises nor arrears of royalty were been paid by the respondents. In this view of scenario, Shri Shah submits that this Court should refuse to exercise discretionary powers in favour of the respondents in the matter of condonation of delay.

In his submission, the attitude adopted by the respondents right from the inception of litigation has been that of defiance and at no point of time respondents complied with orders passed by this Court in its true letter and spirit. Shri Shah submits, negligent, careless and perfunctory approach on the part of the respondents needs to be taken serious note of and after taking totality of circumstances, no indulgence should be shown by this Court in favour of the respondents.

33. Shri Shah submits that past 20 years petitioner are fighting for getting possession of the suit premises. The defaults in payment of monthly rent, arrears of rent, grant of royalty amount, default in contesting suits, defaults in taking out notices under Order 9 Rule 13 of C.P.C., within time, defaults in getting them registered with due diligence and failure on the part of the respondents to comply with the orders passed by this Court from time to time till the date of hearing of these petitions, needs to be viewed seriously. Shri Shah submits that if delay is condoned in spite of such serious lapses, it will give wrong signal to the other careless litigants that Courts are prepared to condone any lapse howsoever serious it may be.

34. Shri Shah submits that this is not a case wherein this Court should show any indulgence in favour of the respondents by condoning delay. He submits that even today respondents are defaulters in payment of their dues. They did not deposit arrears in spite of specific directions from writ Court from time to time. He, thus, prayed for rejection of prayers for condonation of delay and to make rule absolute in favour of the petitioners.

35. Per contra, Shri C.R. Dalvi, appearing for the respondents found it difficult to justify conduct of the respondents though he tried his best to contend that delay be condoned subject to imposition of heavy costs with further direction to pay all arrears with heavy interest thereon.

CONSIDERATIION:

(with respect to condonation of delay.

36. Delay in moving an application or notice is a relevant factor for which Court may refuse to entertain application or notice for granting relief.

It is settled law, if proceeding is not brought within a time prescribed under Limitation Act and delay is not satisfactorily explained, Court may in exercise of discretion refuse its assistance. This is particularly so, when to grant condonation would work to a prejudice to the other party affecting their right. Proceeding under O.9 R.13 of C.P.C. are governed by statute of Limitation. Article 123 of the Limitation Act provides for 30 days period of limitation to take out notice to set aside an exparte decree. Limitation begins to run from the date of the decree where the summons or notice was duly served.

37. In the cases in hand, respondents had appeared in suits. Therefore, limitation to set aside exparte decree will have to be counted from the date of decree in question. If that be so, inordinate delay has not been explained from the date of decree. No sufficient cause in support of prayer for condonation of delay has been shown or established. The reasons sought to be putforth hardly inspire judicial confidence. No reasons worth consideration are putforth for condonation of delay. Negligence on the part of the respondents during the trial of suit and even subsequent thereto

in moving application under O.9 R.13 of C.P.C. are sufficient to disentitle respondents to claim condonation of delay.

38. No material is produced on record by the respondents to substantiate their submissions or reasons disclosed in support of prayers for condonation of delay. No details or material particulars of the alleged various litigations were disclosed. Why the advocate could not be contacted has also not been disclosed. Why notices were allowed to be kept unregistered has also not been disclosed. Why orders of the trial Court directing deposit has not been complied with has also not been clarified. I do not propose to consider the effect of non-comliance of the orders of this Court passed during the pendency of the writ petitions as it has no bearing on the question of condonation of delay.

39. Inordinate and unexplained delay cannot be condoned. In absence of satisfactory explanation prayer for condonation of delay cannot be granted. The action of the Court cannot harm innocent parties if their rights emerge by reason of delay on the part of person moving the Court. To condone delay or not is one of discretion for the Court to follow

case to case. But discretion has to be exercised judiciously depending upon the facts of each case. In the cases in hand, taking overall view of the matter, delay in taking out notices under O.9 R.13 has not been explained. The explanation furnished has not been established. The absence of material evidence, (about number of alleged litigations faced by the respondents) which was well within the exclusive knowledge of the respondents only, compels me to draw an inference that had the said material been disclosed or produced, it would have gone against the respondents or that there was no such circumstance or reason in existence. The reason sought to be given appears to be a false reason. Petitioners are fighting this litigation since last 20 years. Condonation of delay will cause substantial prejudice to the petitioners. Interest of justice lies in rejecting prayer for condonation of delay rather than granting it.

40. In the result, impugned orders are set aside. Both petitions are allowed and rule in each petition is made absolute. No order as to costs.

IN THE HIGH COURT OF JUDICATURE AT BOBBY.

APPELLATE SIDE

WRIT PETITION NO. 5046 OF 1990.

WITH

WRIT PETITION NO. 5047 OF 1990.

CORAM: V.C.DAGA,J.

DATE : 18.6.2004.

P.C.

. This petition was heard in the previous sitting. Parties argued these petitions on the premise that there was no application or motion for condonation of delay in moving notice under O.9 R.13 of the C.P.C. for setting aside exparte decree. It appears from the R & P that there was specific prayer for condonation of delay in moving notice- application under O.9 R.13 of the C.P.C.

2. In this view of the factual scenario, it has become necessary to hear parties on this

aspect of the matter. Hence, place these matters on board for further hearing.